92-301

Supreme Court, U.S.
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No. 92-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

THE STATE OF TEXAS,
Petitioner,

v.

ROBERT LYNN JIMENEZ,
Respondent.

Petition for Writ of Certiorari to the Court of Appeals for the Eighth District of Texas

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Texas penal statute which prohibits the destruction of the flag of the United States violate the First Amendment of the Constitution?

2. Should this Court grant certiorari to review its prior decisions holding that flag desecration is protected by the First Amendment?

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceeding below were the petitioner, the State of Texas, and defendant below and the respondent to this petition, Robert Lynn Jimenez. In addition, Timothy Dale Holt and Stephan Richard Pyles were charged in separate criminal informations with the same offense as respondent.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Texas, requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eighth District of Texas entered in this proceeding on March 4, 1992. The Court of Criminal Appeals of Texas refused discretionary review on June 3, 1992. Such refusal of discretionary review became final on June 18, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth District of Texas is reported at 828 S.W.2d 455 [*State v. Jimenez*, 828 S.W.2d 455 (Tex.App.-El Paso 1992, pet. ref'd)], and is set out at pages 1a through 4a of the

appendix. The order of the Texas Court of Criminal Appeals is not reported, but is set out on page 7a of the appendix. The order of the County Court of Midland County, Texas, declaring the Texas flag destruction statute unconstitutional is not reported, but is set out on pages 5a through 6a of the appendix.

JURISDICTION

The opinion of the Court of Appeals for the Eighth District of Texas was entered on March 4, 1992. The Texas Court of Criminal Appeals, the state court of last resort, refused discretionary review on June 3, 1992. The refusal of discretionary review became final on June 18, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the United States Constitution and the Texas Penal Code, which are provided in relevant part.

United States Constitution, Amendment I:

> Congress shall make no law . . . abridging the freedom of speech . . . .

Texas Penal Code, Section 42.14:

> A person commits an offense if the person intentionally or knowingly damages, defaces, multilates, or burns the flag of the United States or the State of Texas.

STATEMENT OF THE CASE

In *Texas v. Johnson*, 491 U.S. 397 (1989), this Court, in a 5-4 vote, held that the Texas penal statute which prohibited desecration of venerated objects, in the case of the burning of an American flag, violated the First Amendment. As a result, the Texas Legislature passed a new penal statute, Section 42.14 of the Texas Penal Code, which made it an offense for any person to dam-

age, deface, burn, or otherwise mutilate the United States or Texas flag. This penal provision was effective September 1, 1989. Shortly thereafter, Congress enacted the Flag Protection Act of 1989. In *United States v. Eichman*, 496 U.S. —— (1990), the same majority of this Court held that the Flag Protection Act of 1989 violated the First Amendment.

On February 23, 1990, respondent was arrested by officers of the Midland Police Department for violation of Section 42.14 of the Texas Penal Code. The officers found respondent and two others in possession of two United States flags and two Texas flags. These flags had been defaced by having various obscenities and satanic symbols written and printed thereon. Respondent was thereafter charged by criminal information for intentionally and knowingly damaging, defacing, and mutilating these flags in violation of Section 42.14. Respondent filed a motion to have the Texas statute declared unconstitutional as violative of the First Amendment, relying upon this Court's decisions in *Johnson* and *Eichman*. The trial court, also relying upon *Johnson* and *Eichman*, agreed with respondent and held that Section 42.14 of the Texas Penal Code violated the First Amendment. The State appealed the trial court's holding to the Court of Appeals for the Eighth District of Texas. The Court of Appeals affirmed the trial court, again relying on *Johnson* and *Eichman*. The Texas Court of Criminal Appeals thereafter refused discretionary review.

REASON FOR GRANTING THE WRIT

Petitioner recognizes the apparent controlling effect of this Court's decisions in *Johnson* and *Eichman* in this case. However, as noted by the Court of Appeals in its opinion, both *Johnson* and *Eichman* were decided by a sharply divided, narrow majority, of this Court. While the easiest course might be to simply apply the doctrine of *stare decisis* and affirm the Court of Appeals, petitioner submits that such doctrine in and of itself should not support bad national policy. This Court has noted that:

> stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with prior doctrine more embracing in its scope, intrinsically sounder, and vertified by experience.

Helvering v. Hallock, 309 U.S. 106, 119 (1940). Indeed, such a fact was recognized in the dissenting opinion of Mr. Justice Stevens, in which the Chief Justice, Justice White, and Justice O'Connor joined, in *Eichman*, where he noted that:

> it might be appropriate to defer to the judgment of the majority and apply the doctrine of *stare decisis* to the case at hand. That action, however, would not honestly reflect my considered judgment concerning the relative importance of the conflicting interests that are at stake. I remain persuaded that the considerations identified in my opinion in *Texas v. Johnson* are of controlling importance in this case as well.

496 U.S. at ——, 110 S.Ct. at 2412.

Petitioner submits that the sounder and more reasoned analysis of the question presented in this case is that expressed by the dissenters in both *Johnson* and *Eichman*. While defacing and mutilitating the United States flag may involve some form of expressive conduct, it is

clear that not every form of expression is protected by the First Amendment. *See*, e.g., *New York v. Ferber*, 458 U.S. 747 (1982) [child pornography outside the scope of First Amendment]; *Miller v. California*, 413 U.S. 15 (1973) [obscene material unprotected by First Amendment]; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1969) [defamation not within scope of First Amendment]; *Brandenburg v. Ohio*, 395 U.S. 444 (1969) [speech likely to incite imminent lawless action not protected by First Amendment]; *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) [no First Amendment protection for "fighting words"]. Petitioner submits that the minimal expressive conduct involved in the act of desecrating the American flag is insufficient to invoke the protection of the First Amendment.

Petitioner submits that the State of Texas has a legitimate interest in preserving the symbols of national and state unity, just as:

> the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients.

Miller v. California, 413 U.S. at 18-19. Petitioner submits that flag desecration represents that type of violent assault upon the deepest feelings and sensitivities of our citizens, especially those who have personally sacrificed to defend that very flag or those who have lost a loved one in its defense, sufficient to justify the protection of our national symbol of unity. As this Court recognized in *Spence v. State of Washington*, 418 U.S. 405, 413 (1974):

> For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and defend a Nation in which self-

> government and personal liberty endure. It evidences both the unity and diversity which are America.

Petitioner respectfully submits that the positions adopted by the four dissenters in *Johnson* and *Eichman* represent the correct analysis to be applied in this case. Accordingly, petitioner requests that a writ of certiorari be issued in this case and that this Court revisit the question presented in *Johnson* and *Eichman*.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for writ of certiorari to the Court of Appeals for the Eighth District of Texas.

Respectfully submitted,

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